

**New York State Department of Taxation and Finance**  
**Office of Tax Policy Analysis**  
**Technical Services Division**

TSB-A-02(5)I  
Income Tax  
July 24, 2002

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I020110A

On January 10, 2002, a Petition for Advisory Opinion was received from Albert Zelony, 156-47 89<sup>th</sup> Street, Howard Beach, New York 11414.

The issue raised by Petitioner, Albert Zelony, is whether a distribution from an Individual Retirement Account (IRA) established by means of a tax-free rollover of amounts received from the City University of New York's Optional Retirement Program may be subtracted from federal adjusted gross income pursuant to section 612(c)(3)(i) of the Tax Law when computing New York adjusted gross income.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is retired from the City University of New York (CUNY) and receives a pension that is funded under the Optional Retirement Program (ORP). The ORP is an employer sponsored qualified pension plan. All payments received from the ORP accumulation will be paid to him as a result of his employment with CUNY. When Petitioner reaches 70 ½ years of age in the year 2002, he will begin to take minimum distribution payments from the ORP. Under an agreement between CUNY and the Custodian of the ORP, a portion of the fund is cashable. That is, Petitioner is allowed to withdraw more than the required minimum distribution. Petitioner intends to transfer either all or a portion of the cashable funds from his pension accumulation to a new IRA, either by trustee-to-trustee transfer or rollover. Because the pension payments are attributable to his employment with the City of New York, distributions from the retirement plan, including interest or any other type of gain or income earned, will be exempt from New York State taxation pursuant to section 612(c)(3)(i) of the Tax Law.

**Applicable Law and Regulations**

Article 16, section 5 of the New York State Constitution provides that "all salaries, wages and other compensation, except pensions, paid to officers and employees of the state and its subdivisions and agencies shall be subject to taxation."

Section 612(a) of the Tax Law provides:

General. The New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section.

Section 612(c) of the Tax Law provides, in part:

Modifications reducing federal adjusted gross income. There shall be subtracted from federal adjusted gross income:

\* \* \*

(3)(i) Pensions to officers and employees of this state, its subdivisions and agencies, to the extent includible in gross income for federal income tax purposes;

\* \* \*

(3-a) Pensions and annuities received by an individual who has attained the age of fifty-nine and one-half, not otherwise excluded pursuant to paragraph three of this subsection, to the extent includible in gross income for federal income tax purposes, but not in excess of twenty thousand dollars, which are periodic payments attributable to personal services performed by such individual prior to his retirement from employment, which arise (i) from an employer-employee relationship or (ii) from contributions to a retirement plan which are deductible for federal income tax purposes. However, the term "pensions and annuities" shall also include distributions received by an individual who has attained the age of fifty-nine and one-half from an individual retirement account or an individual retirement annuity, as defined in section four hundred eight of the internal revenue code, and distributions received by an individual who has attained the age of fifty-nine and one-half from self-employed individual and owner-employee retirement plans which qualify under section four hundred one of the internal revenue code, whether or not the payments are periodic in nature. Nevertheless, the term "pensions and annuities" shall not include any lump sum distribution, as defined in subparagraph (A) of paragraph four of subsection (e) of section four hundred two of the internal revenue code and taxed under section six hundred three of this article. Where a husband and wife file a joint state personal income tax return, the modification provided for in this paragraph shall be computed as if they were filing separate state personal income tax returns. Where a payment would otherwise come within the meaning of the term "pensions and annuities" as set forth in this paragraph, except that such individual is deceased, such payment shall, nevertheless, be treated as a pension or annuity for purposes of this paragraph if such payment is received by such individual's beneficiary.

Section 112.3 of the Personal Income Tax Regulations provides, in part:

The following items are to be subtracted from Federal adjusted gross income in determining the New York adjusted gross income of a resident individual:

\* \* \*

(c)(1) Pensions and other retirement benefits paid to public officers and public employees of New York State, its political subdivisions or agencies or the Federal government.

(i) Retirement benefits provided for in clauses (a) and (b) of this subparagraph which are included in Federal adjusted gross income, relate to services performed as public officers or public employees and all or a portion of which are actually contributed to (rather than merely being deemed contributed to) by New York State, its political subdivisions or agencies or the Federal government, shall be subtracted in computing New York adjusted gross income:

(a) pensions and other retirement benefits (including, but not limited to, annuities, interest and lump sum payments) paid to a public officer or public employee or the beneficiary of a deceased public officer or deceased public employee of New York State, its political subdivisions or agencies;

\* \* \*

(2) Other pension and annuity income.

(i) Pension and annuity income not subject to the modification referred to in paragraph (1) of this subdivision and not in excess of \$20,000, received by an individual may be subtracted in determining New York adjusted gross income providing the following conditions are met:

(a) the pension and annuity income must be included in Federal adjusted gross income;

(b) the pension and annuity income must be received in periodic payments (except where otherwise provided in this paragraph);

(c) the pension and annuity income must be attributable to personal services performed by such individual, prior to such individual's retirement from employment, which arises from either an employer-employee relationship or from contributions to a retirement plan which are tax deductible under the Internal Revenue Code ( e.g., individual retirement account [IRA] or self-employed retirement [Keogh]); and

(d) such individual receiving the pension and annuity income must be 59 ½ years of age or over.

(ii) Distributions from an individual retirement account (IRA) or a self-employed retirement plan (Keogh) will qualify for the pension and annuity

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income modification whether such distributions are periodic payments or a lump sum distribution....

### **Opinion**

Article 16, section 5 of the New York State Constitution provides that "all salaries, wages and other compensation, except pensions, paid to officers and employees of the state and its subdivisions and agencies shall be subject to taxation." Pensions paid to officers and employees of this state, its subdivisions and agencies, to the extent includible in gross income for federal income tax purposes is exempt from personal income tax pursuant to section 612(c)(3)(i) of the Tax Law. In this case, distributions received by Petitioner under the ORP constitute pension and other retirement benefits paid to a public employee of a subdivision of New York State that are exempt from taxation.

In Joseph W. Martiney, Adv Op St Tax Commn, November 24, 1980, TSB-H-80-(523)I, it was held that the distributions from an IRA established by means of a tax-free rollover of amounts received in the form of a pension from New York State or a subdivision or agency thereof, represents a nontaxable return of principal to the extent that the distribution represents a return of the pension funds "rolled over" into the IRA. To the extent that the distribution represents interest, or any other type of gain earned in the account, such portion would be subject to tax.

In Marie Douglas, Adv Op Comm of T&F, March 24, 1998, TSB-A-98(4)I, like Martiney, supra, when the petitioner received distributions from a rollover IRA account, only a portion of the distribution was exempt. The portion of the distribution from the rollover IRA account that represented the amount of the pension benefit that was rolled over into an IRA (the contribution), was considered a return of the pension contribution and was exempt from New York State income tax pursuant to section 612(c)(3)(i) of the Tax Law and section 112.3(c)(1)(i)(a) of the Personal Income Tax Regulations. Such portion of the IRA distribution was subtracted from federal adjusted gross income when computing the petitioner's New York adjusted gross income. However, unlike Martiney, supra, the balance of the distribution from the rollover IRA account that represented any other amount in the rollover IRA account, including any other contributions or any interest or other type of gain or income earned, was allowed to be subtracted in computing New York adjusted gross income, but only up to \$20,000, pursuant to section to section 612(c)(3-a) of the Tax Law and section 112.3(c)(2) of the Personal Income Tax Regulations.

In this case, if Petitioner rolls over his pension accumulation to an IRA, like Martiney, supra, when Petitioner receives distributions from the rollover IRA account, only a portion of the distribution is exempt. Assuming the distributions Petitioner receives from the rollover IRA account are included in his federal adjusted gross income, the portion of a distribution from the rollover IRA account that represents the amount of the pension benefit that was rolled over to the IRA (contribution), is a return of the pension contribution and is exempt from New York State income tax pursuant to Article 16, section 5 of the New York State Constitution and section 612(c)(3)(i) of

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the Tax Law. Such portion of the IRA distribution would be subtracted from federal adjusted gross income when computing Petitioner's New York adjusted gross income.

With respect to distributions of any gain or income earned from a rollover IRA account, since the earnings are not attributable to Petitioner's retirement plan attributable to his employment with the City University of New York, the interest or any other type of gain or income earned is not exempt from New York State taxation pursuant to Article 16, section 5 of the New York State Constitution and section 612(c)(3)(i) of the Tax Law.

However, like Marie Douglas, *supra*, pursuant to section 612(c)(3-a) of the Tax Law and section 112.3(c)(2) of the Personal Income Tax Regulations, the balance of the distributions that represents an amount other than a return of the pension contribution in the rollover IRA account, including any other contributions or any interest or other type of gain or income earned, may be allowed to be subtracted in computing New York adjusted gross income, but only up to \$20,000. Since Petitioner has reached the age of 59 ½ years of age, such amount may be added to Petitioner's other pension and annuity income, if any, that meets the conditions of section 612(c)(3-a) of the Tax Law and section 112.3(c)(2) of the Regulations for purposes of computing the up to \$20,000 pension and annuity income modification. The total, but not in excess of \$20,000, would be allowed as a subtraction from federal adjusted gross income when computing Petitioner's New York adjusted gross income. Any excess would not be allowed as a subtraction from federal adjusted gross income when computing Petitioner's New York adjusted gross income.

DATED: July 24, 2002

/s/  
Jonathan Pessen  
Tax Regulations Specialist IV  
Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.